

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 15, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEWART KERR, MD, a married
individual,

Plaintiff,

v.

WENATCHEE VALLEY MEDICAL
GROUP, a Washington professional
service corporation; CONFLUENCE
HEALTH, a Washington professional
service corporation; STUART
FREED, an individual; and PETER
RUTHERFORD, an individual,

Defendants.

NO: 2:20-CV-92-RMP

PROTECTIVE ORDER

BEFORE THE COURT is a motion for entry of a stipulated, qualified protective order, ECF No. 30, by Plaintiff Dr. Stuart Kerr and Defendants Confluence Health and Dr. Peter Rutherford and Defendants Wenatchee Valley Medical Group and Dr. Stuart Freed. A district court may issue protective orders regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Before issuing a stipulated protective order, a district court judge should ensure that the protective order's restrictions do not infringe on the public's general right to

1 inspect and copy judicial records and documents. *See Kamakana v. City and Cty.*
2 *of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *see also Courthouse News Serv.*
3 *v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (recognizing a long-held First
4 Amendment right of access to court proceedings and documents).

5 Having reviewed the protective order and the remaining record, the Court
6 finds good cause to grant the stipulated motion and enter the agreed-upon
7 protective order. Accordingly, **IT IS HEREBY ORDERED** that the parties'
8 motion for entry of a stipulated protective order, **ECF No. 30**, is **GRANTED**. The
9 protective order in effect is set forth below.

10 **PROTECTIVE ORDER**

11 **1. Purposes and Limitations**

12 Discovery in this action is likely to involve production of confidential,
13 proprietary, or private information, including protected health information, for
14 which special protection may be warranted. Accordingly, the parties hereby
15 stipulate to and petition the court to enter the following Stipulated Protective
16 Order pursuant to Fed. R. Civ. P. 26. The parties acknowledge that they have
17 conferred about the subject matter of this order pursuant as required by LCivR 37
18 and that, to the extent this order concerns protected health information, they are
19 tendering this order as a proposed qualified protective order within the meaning of
20 45 C.F.R. § 164.512.
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1 This order does not confer blanket protection on all disclosures or responses
2 to discovery, the protection it affords from public disclosure and use extends only
3 to the limited information or items that are entitled to confidential treatment under
4 the applicable legal principles, and it does not presumptively entitle parties to file
5 confidential information under seal.

6 **2. “Confidential” Material**

7 “Confidential” material shall include the following documents and tangible
8 things produced or otherwise exchanged:

9 2.1 “protected health information” about any person, within the meaning
10 of 45 C.F.R. §§ 160.103, 164.501, including demographic information;
11 information about the past, present, or future physical or mental condition of an
12 individual; the provision of care to an individual; or the payment for care provided
13 to an individual, which identifies the individual or which reasonably could be
14 expected to identify the individual;

15 2.2 “personal information” about a person, as that phrase is defined in
16 RCW 19.255.005(2)(a); or

17 2.3 financial statements, bank account statements, tax records, or other
18 personal financial information about a person whose public disclosure would be
19 harmful or oppressive to a reasonable person.
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3. Scope

The protections conferred by this agreement cover not only confidential material (as defined above), but also (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material.

However, the protections conferred by this agreement do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.

4. Access To, and Use Of, Confidential Material

4.1 **Basic Principles.** A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation.

Confidential material may be disclosed only to the categories of persons and under the conditions described in this agreement. Confidential material must be stored and maintained by a receiving party at a location and in a secure manner that ensures that access is limited to the persons authorized under this agreement.

4.2 **Disclosure of “CONFIDENTIAL” Information or Items.** Unless otherwise ordered by the court or permitted in writing by the designating party, a receiving party may disclose any confidential material only to:

1 (a). the receiving party's counsel of record in this action, as well as
2 employees of counsel to whom it is reasonably necessary to disclose the
3 information for this litigation;

4 (b). the officers, directors, and employees (including in house
5 counsel) of the receiving party to whom disclosure is reasonably necessary for this
6 litigation;

7 (c). experts and consultants to whom disclosure is reasonably
8 necessary for this litigation and who have signed the "Acknowledgment and
9 Agreement to Be Bound" (Exhibit A);

10 (d). the court, court personnel, and court reporters and their staff;

11 (e). copy or imaging services retained by counsel to assist in the
12 duplication of confidential material, provided that counsel for the party retaining
13 the copy or imaging service instructs the service not to disclose any confidential
14 material to third parties and to immediately return all originals and copies of any
15 confidential material;

16 (f). during their depositions, witnesses in the action to whom
17 disclosure is reasonably necessary and who have signed the "Acknowledgment and
18 Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the designating
19 party or ordered by the court. Pages of transcribed deposition testimony or exhibits
20 to depositions that reveal confidential material must be separately bound by the
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1 court reporter and may not be disclosed to anyone except as permitted under this
2 agreement;

3 (g). the author or recipient of a document containing the
4 information or a custodian or other person who otherwise possessed or knew the
5 information.

6 **4.3 Filing Confidential Material.** Any party that seeks to file any
7 material designated as “CONFIDENTIAL” must file a motion to seal, identifying
8 (by Bates number) any material designated as “CONFIDENTIAL” that any party
9 wishes to file under seal, and comply with the provisions for filing materials under
10 seal contained in the Federal Rules of Civil Procedure and/or Local Rules of the
11 Court. The designation of documents or materials as “CONFIDENTIAL” shall not
12 constitute evidence as to whether such documents or materials may properly be
13 sealed. A party’s failure to contest a disclosing party’s designation of documents or
14 material as “CONFIDENTIAL” before the filing of a motion to seal shall not be
15 deemed an admission by the party who failed to contest the designation that such
16 documents or material should be filed under seal. If the party filing the motion to
17 seal is not the party that designated the materials as “CONFIDENTIAL,” the
18 designating party, in its response to the motion to seal, shall have the burden to
19 justify the need for the “CONFIDENTIAL” materials to be filed under seal.

5. Designating Protected Material

5.1 **Exercise of Restraint and Care in Designating Material for Protection.** Each party or non-party that designates information or items for protection under this agreement must take care to limit any such designation to specific material that qualifies under the appropriate standards. The designating party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify, so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this agreement.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or delay the case development process or to impose unnecessary expenses and burdens on other parties) expose the designating party to sanctions.

If it comes to a designating party's attention that information or items that it designated for protection do not qualify for protection, the designating party must promptly notify all other parties that it is withdrawing the mistaken designation.

5.2 **Manner and Timing of Designations.** Except as otherwise provided in this agreement (see, e.g., second sentence of section 5.2(a) below), or as otherwise stipulated or ordered, disclosure or discovery material that qualifies for

1 protection under this agreement must be clearly so designated before or when the
2 material is disclosed or produced.

3 (a). Information in documentary form: (e.g., paper or electronic
4 documents and deposition exhibits, but excluding transcripts of depositions or
5 other pretrial or trial proceedings), the designating party must affix the word
6 “CONFIDENTIAL” to each page that contains confidential material. If only a
7 portion or portions of the material on a page qualifies for protection, the producing
8 party also must clearly identify the protected portion(s) (e.g., by making
9 appropriate markings in the margins).

10 (b). Testimony given in deposition or in other pretrial proceedings:
11 the parties and any participating non-parties must identify on the record, during the
12 deposition or other pretrial proceeding, all protected testimony, without prejudice
13 to their right to so designate other testimony after reviewing the transcript. Any
14 party or non-party may, within fifteen days after receiving the transcript of the
15 deposition or other pretrial proceeding, designate portions of the transcript, or
16 exhibits thereto, as confidential. If a party or non-party desires to protect
17 confidential information at trial, the issue should be addressed during the pre-trial
18 conference.

19 (c). Other tangible items: the producing party must affix in a
20 prominent place on the exterior of the container or containers in which the
21 information or item is stored the word “CONFIDENTIAL.” If only a portion or

1 portions of the information or item warrant protection, the producing party, to the
2 extent practicable, shall identify the protected portion(s).

3 **5.3 Inadvertent Failures to Designate.** If timely corrected, an
4 inadvertent failure to designate qualified information or items does not, standing
5 alone, waive the designating party's right to secure protection under this agreement
6 for such material. Upon timely correction of a designation, the receiving party
7 must make reasonable efforts to ensure that the material is treated in accordance
8 with the provisions of this agreement.

9 **6. Protected Health Information Received from Covered Entities**

10 **6.1 Authorization.** In accordance with the Health Insurance Portability
11 and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. § 160.512(e), it is hereby
12 stipulated and agreed by and between the respective parties hereto and Ordered by
13 the Court that WVMG and Confluence Health (collectively, "Defendants") are
14 authorized to disclose, transmit, and produce Protected Health Information,
15 including excerpts of medical records and/or patient files regarding treatment
16 and/or services provided by Defendants, in response to Plaintiff's discovery
17 requests. All "covered entities" (as defined by 45 C.F.R. § 160.13) are authorized
18 to disclose protected health information to attorneys who represent one of the
19 parties in the captioned lawsuit. The disclosure of Protected Health Information
20 will be conducted pursuant to the following terms, restrictions and conditions as
21 ordered by the Court.

1 **6.2 Prohibition.** Pursuant to 45 U.S.C. § 164.512(e)(1)(v)(A), anyone
2 who receives protected health information pursuant to this order prohibited from
3 using or disclosing that information for any purpose other than prosecuting or
4 defending the captioned lawsuit (including appeals, if any). “Prosecuting or
5 defending the captioned lawsuit” includes disclosures to attorneys, experts,
6 consultants, Court personnel, court reporters, copy services, trial consultants, and
7 other entities or persons involved in the litigation process. This Order shall not
8 preclude the parties from using any Protected Health Information during
9 depositions.

10 **6.3 Limitation.** Before disclosing protected health information to persons
11 other than the parties’ lawyers, the disclosing person must inform each recipient
12 that the protected person may not be used or disclosed for any purpose other than
13 this litigation.

14 **6.4 Requirements of Counsel.** Counsel shall take all reasonable steps to
15 ensure that persons receiving protected health information from covered entities do
16 not use or disclose such information for any purpose other than this litigation.

17 **6.5 Requirements on Conclusion of Litigation.** Pursuant to 45 U.S.C. §
18 164.512(e)(1)(V)(B), within 60 days after the conclusion of the litigation
19 (including any appeals), the parties, their attorneys, and any person or entity in
20 possession of protected health information received from covered entities pursuant
21 to this Order shall either return it to the covered entity or destroy it, as well as all

1 copies of it. Counsel will not be required to secure the return or destruction of
2 protected health information that had been submitted to the Court.

3 **6.6 Limitation.** This Order does not control or limit the use of protected
4 health information that comes into the possession of the parties or their attorneys
5 from a source other than a “covered entity,” as that term is defined in 45 C.F.R. §
6 160.103.

7 **7. Challenging Confidentiality Designations**

8 **7.1 Timing of Challenges.** Any party or non-party may challenge a
9 designation of confidentiality at any time. Unless a prompt challenge to a
10 designating party’s confidentiality designation is necessary to avoid foreseeable,
11 substantial unfairness, unnecessary economic burdens, or a significant disruption
12 or delay of the litigation, a party does not waive its right to challenge a
13 confidentiality designation by electing not to mount a challenge promptly after the
14 original designation is disclosed.

15 **7.2 Meet and Confer.** The parties must make every attempt to resolve
16 any dispute regarding confidential designations without court involvement. Any
17 motion regarding confidential designations or for a protective order must include a
18 certification, in the motion or in a declaration or affidavit, that the movant has
19 engaged in a good faith meet and confer conference with other affected parties in
20 an effort to resolve the dispute without court action. The certification must list the
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1 date, manner, and participants to the conference. A good faith effort to confer
2 requires a face-to-face meeting or a telephone conference.

3 **7.3 Judicial Intervention.** If the parties cannot resolve a challenge
4 without court intervention, the designating party may file and serve a motion to
5 retain confidentiality under Local Civil Rule 7. The burden of persuasion in any
6 such motion shall be on the designating party. Frivolous challenges, and those
7 made for an improper purpose (e.g., to harass or impose unnecessary expenses and
8 burdens on other parties) may expose the challenging party to sanctions. All parties
9 shall continue to maintain the material in question as confidential until the court
10 rules on the challenge.

11 **8. Protected Material Subpoenaed or Ordered Produced in Other Litigation**

12 If a party is served with a subpoena or a court order issued in other litigation
13 that compels disclosure of any information or items designated in this action as
14 “CONFIDENTIAL,” that party must:

15 (a). promptly notify the designating party in writing and include a
16 copy of the subpoena or court order;

17 (b). promptly notify in writing the party who caused the subpoena
18 or order to issue in the other litigation that some or all of the material covered by
19 the subpoena or order is subject to this agreement. Such notification shall include a
20 copy of this agreement; and
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1 (c). cooperate with respect to all reasonable procedures sought to be
2 pursued by the designating party whose confidential material may be affected.

3 **9. Unauthorized Disclosure of Protected Material**

4 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
5 confidential material to any person or in any circumstance not authorized under
6 this agreement, the receiving party must immediately (a) notify in writing the
7 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
8 all unauthorized copies of the protected material, (c) inform the person or persons
9 to whom unauthorized disclosures were made of all the terms of this agreement,
10 and (d) request that such person or persons execute the “Acknowledgment and
11 Agreement to Be Bound” that is attached hereto as Exhibit A.

12 **10. Inadvertent Production of Privileged or Otherwise Protected Material**

13 When a producing party gives notice to receiving parties that certain
14 inadvertently produced material is subject to a claim of privilege or other
15 protection, the obligations of the receiving parties are those set forth in Federal
16 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
17 whatever procedure may be established in an e-discovery order or agreement that
18 provides for production without prior privilege review. The parties agree to the
19 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.
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11. Non Termination and Return of Documents

Within 60 days after the termination of this action, including all appeals, each receiving party must return all confidential material to the producing party, including all copies, extracts and summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction. If the confidential information consists of protected health information received from a covered entity, it shall be returned to the covered entity or destroyed as described in section 6.4 of this Order.

Notwithstanding this provision, counsel are entitled to retain one archival copy of all documents filed with the court, trial, deposition, and hearing transcripts, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain confidential material.

The confidentiality obligations imposed by this agreement shall remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.

12. Effect of Stipulated Protective Order

In the absence of a stipulation of all parties, the fact that information is designated as confidential material shall not be admissible, nor shall the trier of fact be advised of such designation during the hearing in this action.

1 **13. Application to Court**

2 This Stipulated Protective Order is without prejudice to the right of any
3 interested party to apply to the Court for an order permitting the disclosure of any
4 confidential material, or to apply for an order modifying or limiting this Stipulated
5 Protective Order in any respect. This Stipulation shall not preclude any party from
6 seeking and obtaining from the Court additional protection with respect to the
7 confidentiality of documents.

8 **14. Continuing Jurisdiction**

9 All provisions of this Stipulated Protective Order shall continue to be binding after
10 the conclusion of this action unless subsequently modified by agreement between
11 the Parties or order of the Court and the Court shall retain jurisdiction of this
12 matter for the purpose of enforcing this Stipulation.

13 **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

14 **IT IS FURTHER ORDERED** that pursuant to Fed. R. Evid. 502(d), the
15 production of any documents in this proceeding shall not, for the purposes of this
16 proceeding or any other federal or state proceeding, constitute a waiver by the
17 producing party of any privilege applicable to those documents, including the
18 attorney-client privilege, attorney work-product protection, or any other privilege
19 or protection recognized by law.

